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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~130~~ 133.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 11, 1905.

(19,932.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1905.

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1 THE UNITED STATES OF AMERICA:

To The National Enameling and Stamping Company & George Wettengel, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Conrad Wecker is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable G. A. Finkelnburg, Judge of the Circuit Court of the United States for the Eastern District of Missouri, this 15th day of September in the year of our Lord one thousand nine hundred and five (1905).

G. A. FINKELNBURG,
United States District Judge for the Eastern
District of Missouri.

Service of above acknowledged Sept. 15, '05.
NATIONAL ENAMELING & STAMPING CO.,
GEORGE WETTENGEL,
SEDDON & HOLLAND,
WISE & McNULTY, Their Attorneys.

1½ [Endorsed:] No. 5068 United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. Conrad Wecker vs. The National Enameling Co. Harry Schenk and George Wettengel Citation. Filed Sep. 15 1905. James R. Gray, Clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the March Term, 1905, thereof, between Conrad Wecker, Plaintiff and The National Enameling & Stamping Co., and George Wethengel Defendants a manifest error hath happened, to the great damage of the said Conrad Wecker as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 15th day of October 1905, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of September in the year of our Lord one thousand nine hundred and five (1905).

Issued at office in the City of St. Louis, with the seal of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, dated as aforesaid.

{ Seal of the United States Circuit Court, Missouri, Eastern Division of the Eastern Judicial District. }

JAMES R. GRAY,
Clerk Circuit Court United States, Eastern Division
of the Eastern Judicial District of Missouri.
By —— ——, Deputy.

Allowed by
G. A. FINKELNBURG, Judge.

3 [Endorsed:] No. 5068 United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. Conrad Wecker vs. The National Enameling & Stamping Co. *et al.* Writ of Error to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. Filed Sep. 15 1905. James R. Gray, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of St. Louis, this 16" day of September A. D. 1905.

{ Seal of the United States Circuit Court, Missouri, Eastern Division of the Eastern Judicial District. }

JAMES R. GRAY,
Clerk of said Court.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Be it remembered, that heretofore, to-wit: on the 19th day of September, A. D. 1904, there was filed in the office of the clerk of the circuit court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, in a certain cause wherein Conrad Wecker is Plaintiff and National Enameling & Stamping Company, a corporation, Harry Schenk, and George Wettengel, are Defendants, a Transcript from the Circuit Court City of St. Louis, which said Transcript is in words and figures as follows, to-wit:—

(Transcript.)

STATE OF MISSOURI,
City of St. Louis, } ss:

Be it remembered, that heretofore, to-wit: on the 15th day of April, A. D. 1904, there was filed in the office of the Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, a petition in cause No. 32452, Series A., of the causes in said Court, wherein Conrad Wecker, is plaintiff and the National Enameling Company, *et al.*, are defendants.

The said petition is in words and figures as follows, to-wit:

STATE OF MISSOURI,
City of St. Louis, } ss:

In the Circuit Court, City of St. Louis, State of Missouri, June Term, 1904.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING COMPANY, a Corporation; Harry Schenk, and George Wettengel, Defendants.

Plaintiff for his cause of action, states: That the said National Enameling & Stamping Company is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and that said Harry Schenk and George Wettengel are residents of the city of St. Louis, State of Missouri. That at and before the time of the commission of the grievances hereinafter mentioned, said plaintiff was employed by said defendant corporation to fire, fill, stir, empty and attend to certain large metal pots used by said defendant corporation for melting grease and lubricant matter at the plant operated by it at Granite City, county of Madison, State of Illinois. The said grease and lubricant matter was delivered by said defendant corporation to said plaintiff in solid form in barrels of great weight, to-wit: about six hundred (600) pounds each. In

the course of his said employment it was plaintiff's duty, after removing the barrels from around said grease and lubricant matter, to hoist the same to the top surface of the furnace structure, into which said pots were set, and to dump said grease and lubricant matter into the said pots. The said defendant corporation wholly and negligently failed to perform the duties, which as master it owed to said plaintiff, while engaged in its employment as aforesaid.

6 Defendant's said negligence consisted in this, to-wit: that it negligently allowed said pots, about which plaintiff was employed as aforesaid, and which were constantly filled with hot and boiling grease and lubricant matter, to remain open and exposed and negligently failed to provide for the said pots any covering, railing, or any devise or means of any character whatsoever whereby to reasonably protect plaintiff, its servant, from accidentally slipping or falling into the same while engaged in the performance of his aforesaid duties. And said defendant corporation negligently constructed said furnace structure in which said pots were set, on and about which said plaintiff was employed by said defendant corporation; and negligently failed to provide and properly place reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and said defendant corporation negligently gave to plaintiff such instructions as to the manner of performing his said duties as unreasonably endangered the safety of said plaintiff in carrying out the same.

As a result of the said premises and of said defendant corporation's said negligence plaintiff, while engaged in the performance of his said duties upon the top surface of said furnace structure, on or about the 12th day of November, 1902, lost his balance and fell into one of the aforesaid open, unguarded and unprotected pots containing hot and boiling grease and lubricant matter; and received great and painful burns and injuries the nature and extent of which are hereinafter more particularly described.

Plaintiff further says that the said Harry Schenk and the said George Wettengel were employed by said defendant corporation and

7 charged by it with the superintendence and oversight of said plaintiff in the performance of his aforesaid duties and the said Schenk and the said Wettengel were employed by said defendant corporation and charged by it with the duty of superintending and properly planning the construction of the said furnace structure into which the said pots were set; and further charged by said defendant corporation with the duty of providing for said pots reasonably safe and suitable covering, railing, or other device to protect plaintiff from slipping or falling into the same while plaintiff was engaged in the performance of plaintiff's aforesaid duties; and further charged by said defendant corporation with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and further charged by said defendant corporation with the duty of properly instructing said plaintiff as to the manner of performing

said plaintiff's duties. Nevertheless said defendants, Harry Schenk and George Wettengel, negligently planned and directed the construction of the said furnace structure into which the said pots were set, so that same was not a reasonably safe place for plaintiff to work in the performance of his aforesaid duties; and negligently failed to provide for the said pots reasonably safe and suitable covers or railing or other device to protect plaintiff from slipping or falling into the same while plaintiff was engaged in the performance of plaintiff's aforesaid duties; and negligently failed to provide and properly place reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and negligently gave to plaintiff such instructions as to the manner of performing plaintiff's said duties as unreasonably endangered the safety of said plaintiff in carrying out the same. As a result of the said premises and of the said negligence of said defendants, said plaintiff,
8 while engaged in performance of his said duties upon the top surface of said furnace structure, on or about the 12th day of November, 1902, lost his balance and fell into one of the aforesaid unguarded and unprotected pots containing hot and boiling grease and lubricant matter and received great and painful burns and injuries, the nature and extent of which are hereinafter more particularly described. The injuries which plaintiff received as aforesaid, on or about November 12, 1902, and which hereinbefore he has alleged were the result of the aforesaid negligence of said defendant corporation and of said defendants Harry Schenk and George Wettengel, were the result of the joint negligence of said defendants and each act of negligence which plaintiff has hereinbefore charged against each of said defendants was the joint act of all of said defendants.

The injuries which plaintiff received as aforesaid as the result of the joint negligence of said defendants are as follows, to-wit: severe serious, painful and permanent burns and injuries of both hands and arms and of both feet and legs. As a result of said injuries plaintiff has suffered, still suffers, and will hereafter suffer great pain and agony of mind and body; and as a result of said injuries has necessarily expended moneys and incurred liabilities in a large amount for medicines and doctor's fees, to-wit: One Thousand Dollars, ($1000.00); and as a result of said injuries it has been necessary for plaintiff, for a long period of time, to-wit: seventeen months (17), to have the constant care, attention, and nursing of his wife and other members of his family, and the reasonable value of said services in nursing and caring for plaintiff is Five Hundred Dollars ($500.00). Plaintiff's daily earnings prior to said injuries
9 were Two and 25 100 Dollars ($2 25) per day. Since receiving said injuries and as a result thereof, plaintiff has been unable to do any work or labor or to earn anything in any way; wherefore has lost salary and wages to a large amount, to-wit: Nine Hundred and Eighteen Dollars ($918.00); and as a result of said injuries plaintiff's future earning capacity will be permanently diminished and probably entirely destroyed. All of which has damaged plain-

tiff to a large amount, to-wit: Fifteen Thousand ($15,000.00), for which amount he prays judgment together with his costs in this behalf expended.

R. T. BROWNRIGG &
W. L. MASON,
Att'ys for Plaintiff.

Upon the filing of the said petition, a writ of summons for the defendants, was issued by the Clerk of said Court, to the sheriff of the City of St. Louis.

The said writ, together with the returns of service thereon endorsed, are respectively in words and figures as follows, to-wit:

STATE OF MISSOURI, } ss:
City of St. Louis, }

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

We command you to summon National Enameling & Stamping Company a corporation; Harry Schenk and George Wettengel, to appear before the Judges of our Circuit Court, on the first day of the next term thereof, to be held in the City of St. Louis, at the Court House in said City, on the first Monday of June next, then and there to answer the complaint of Conrad Wecker as set forth in the annexed petition; and have you then and there this writ.

Witness, William H. Hauschulte, Clerk of our said Court,
10 with the seal thereof hereto affixed, at office in the City of St. Louis, this 19th day of April in the year of our Lord nineteen hundred and four.

[SEAL.] WM. H. HAUSCHULTE, Clerk.

Served this writ in the City of St. Louis, Missouri, on the within named defendant The National Enameling and Stamping Company (a corporation), this 20th day of April 1904, by delivering a copy of the writ and petition as furnished by the Clerk to H. F. Niedringhaus Cashier of the said defendant Corporation, he being in said defendant's usual business office and in charge thereof.

The President or other Chief Officer of said defendant could not be found in the City of St. Louis at the time of service.

JOSEPH F. DICKMANN, Sheriff,
By J. ROMANSKY, Deputy.

I further executed this writ in the City of St. Louis, this 2nd day of May 1904, by leaving a copy of the writ as furnished by the Clerk for George Wittengel a defendant herein, at his usual place of abode with a person of his family over the age of 15 years.

JOSEPH F. DICKMANN, Sheriff,
By EDW. PHELAN, Deputy.

After due and diligent search the within named defendant Harry Schenk cannot be found in the *in the* City of St. Louis, Mo.

JOSEPH F. DICKMANN, Sheriff.
J. ROMANSKY, Deputy.

Fee $2.50.

11 And afterwards, to-wit: at the June term, 1904, of said Court, the following proceedings were had in said cause, to-wit:

MONDAY, June 6th, 1904.

CONRAD WECKER
vs.
NATIONAL ENAMELING CO. (and Other Causes). } 32452. Motion for Security for Costs Filed.

MONDAY, June 6th, 1904.

CONRAD WECKER
vs.
NATIONAL ENAMELING AND STAMPING COMPANY, HARRY Schenk, and George Wettengel. } 32452*a*.

Now at this day comes the defendant by attorney, and files a petition duly verified by affidavit, praying for the removal of this cause to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and also files herein its bond, conditioned according to law, in the sum of Five Hundred Dollars, and the Court having heard and duly considered the said petition, doth approve said bond, and doth order, that the Clerk of this Court, do forthwith certify to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, a transcript of the record and proceedings in this cause as fully as the same remain on file and of record in this Court.

The said petition and bond for removal, are respectively in the words and figures following, to-wit:

12 STATE OF MISSOURI, } *ss*:
City of St. Louis, }

In the Circuit Court, City of St. Louis, June Term, A. D. 1904.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING COMPANY, a Corporation; Harry Schenk, and George Wettengel, Defendants.

Petition on behalf of the National Enameling & Stamping Company, a corporation, for the removal of this cause to the circuit court of the United States in and for the eastern division of the eastern district of the State of Missouri.

To the honorable the circuit court of the city of St. Louis, State of Missouri:

Your petitioner, The National Enameling & Stamping Company, a corporation, limiting its appearance herein for the purpose of filing this petition, and not admitting the jurisdiction of this Court, over it and appearing for no other purpose whatever, respectfully repre-

sents to the Court that it is one of the defendants in the above entitled suit, and your petitioner shows unto the Court:

That it is one of the defendants in the above entitled suit;

That the matter and amount in dispute in said suit exceeds, exclusive of interests and costs, the sum or value of two thousand dollars ($2,000.00);

That the said suit is of a civil nature at common law, of which the Circuit Court of the United States had original jurisdiction;

That said suit has been brought and is now pending in this Court, and has not yet been tried, nor has the time within which this defendant, your petitioner, is required by the laws of the State
13 of Missouri, or any rule of this Honorable Court to answer or plead to the complaint of the plaintiff elapsed;

That said plaintiff herein is now and was at the time of the bringing of this suit and ever since has been a citizen of the City of St. Louis and of the State of Missouri.

That your petitioner, the National Enameling & Stamping Company, was at the time of the bringing of this suit, is now and *eversince* has been a citizen of the State of New Jersey, in which State it was then and *eversince* has been, and is now duly incorporated, and that it was not at the time of the commencement of this suit and never has been and is not now incorporated in the State of Missouri, nor a citizen thereof;

That Harry Schenk, one of the co-defendants in this suit, has not been served with process herein; that he was at the time of the commencement of this suit, ever since has been and is now a citizen of the State of Illinois, residing in Granite City Illinois;

That the said co-defendant, George Wettengel, is now, was at the time of the commencement of this suit and ever since has been a citizen of the State of Missouri.

That there is in said suit a controversy wholly between citizens of different States, and which can wholly be determined between them, to-wit: between your petitioner and the said plaintiff, and that said separate controversy is wholly between your said petitioner and the said plaintiff, and the said co-defendants of your petitioner are not interested in the determination thereof or necessary parties thereto, and said separate controversy is this: That your petitioner at the time of the alleged accident to the said Conrad Wecker was the employer of the said Wecker, and the owner of the factory wherein he was working, as appears by the said petition on file, and the issue and controversy whether this defendant negligently allowed
14 the pots about which the plaintiff was employed to remain open and exposed, and whether your petitioner negligently failed to provide for said pots any covering, railing or other means to reasonably protect the plaintiff from slipping or falling into the same while he was performing his duties, and whether your petitioner negligently constructed the said furnace structure upon which the said pots were set, and whether your petitioner negligently failed to provide proper and reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating the grease and lubricant matter to the top surface of the furnace structure, and whether your

petitioner negligently gave the plaintiff such instructions as to the manner of performing his duties, and unreasonably endangering the plaintiff in carrying out the same, which controversies and matters must be wholly determined between your petitioner and the said plaintiff, and in which its said co-defendants, Schenk and Wettengel, can have no interest.

And your petitioner further shows unto your Honor that there is a separate controversy stated on the face of the said petition which is wholly between the said plaintiff and your petitioner, and may be wholly determined between them without its co-defendants being parties thereto, and that said separate controversy is this: that the said co-defendants, as servants of your said petitioner, may not be joined in this suit against them for the matters and things alleged against them in the plaintiff's petition, and that as to the matters and things alleged against your petitioner in said petition, it appears from the face of the petition that these matters are matters wholly to be determined between the plaintiff and your petitioner, and which may not be determined between the plaintiff and its co-defendants.

And your petitioner further avers that there is in said cause the further separable controversy, namely:—whether the said plaintiff assumes the risk of being injured while in his employment, and that this controversy is wholly between the said plaintiff and your petitioner, and its co-defendants have and can have no interest therein, and the same may be wholly determined between the plaintiff and your petitioner.

And your petitioner further avers that the said Harry Schenk and the said George Wettengel were not at the time of the accident to the said plaintiff, or prior thereto, charged with the superintendancy and oversight of the plaintiff, or with the duty of superintending and properly planning the construction of the said furnace structure, into which the pots were set, and were not charged by the defendant with the duty of providing for the pots reasonably safe and suitable covering, railing, or other device to protect plaintiff from slipping or falling into the same, and were not charged with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of the said furnace structure, and were not charged by your petitioner with the duty of properly instructing the plaintiff as to the manner of performing said plaintiff's duties, and it is not true that the said defendants, Schenk and Wettengel or either of them negligently failed to carry out the said alleged duties mentioned in plaintiff's petition or any of them; and it appears from the face of the plaintiff's said petition that the said plaintiff was not injured by reason of the failure of the said Schenk and Wettengel to perform any of the said duties alleged against them, but was injured from other and different grounds.

And your petitioner further avers that the said Harry Schenk being a citizen of the State of Illinois, that as to him and your petitioner, this suit is removable, and should be removed to the

United States Circuit Court in and for the Eastern Division of the Eastern District of the State of Missouri, as herein prayed, and that as to the said George Wettengel, your petitioner charges
16 and states the fact to be that he is improperly and fraudulently joined herein with your petitioner by the plaintiff in this suit, for the sole purpose of fraudulently and improperly preventing or attempting to prevent this petitioner from removing this cause to the United States Circuit Court in and for the Eastern Division of the Eastern District of the State of Missouri, as prayed for herein, and for no other purpose, and that the said plaintiff well knew at the time of the bringing of this suit that the said Wettengel was in no manner charged with the performance of any of the duties which it is alleged he should have performed in the said petition, and the said plaintiff well knew at the time of the bringing of this suit that the said Wettengel was not in or about the place where the said plaintiff was injured at the time of the said injury; that he in no manner was in control or superintendent; that it was not his duty to plan the construction of the said furnace or to provide any covering, railing or other divice in or about said pots, or to provide reasonably safe and sufficient hoisting apparatus for plaintiff's use, but that the said plaintiff with this knowledge joined the said Wettengel herein solely to prevent the removal of this cause, and not in good faith.

And your petitioner further states that the petition herein states no cause of action against said Wettengel.

And your petitioner shows that by reason of the premises it desires and is entitled to have the said suit removed from the Circuit Court of the City of St. Louis, Missouri into the Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri.

17 And your petitioner offers herewith a bond with good and sufficient surety, for its entering in the Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri, on the first day of its next term, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to provide no further order herein, except to make an order for the removal of this cause to the said Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri, and to accept the said surety and bond, and to cause the record herein to be removed to the said Circuit Court of the United States, as herein prayed for.

NATIONAL ENAMELING AND
STAMPING COMPANY,
By WISE & McNULTY AND
SEDDON & HOLLAND, Its Attorneys.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Merritt *M.* Hayden, being duly sworn, on his oath says, that he is the agent in this behalf of the National Enameling and Stamping Company, and that he makes this affidavit as such for and on behalf of said Company.

Affiant says that he has read the foregoing petition and knows its contents, and that the same is true in substance and in fact of affiant's own knowledge, except as to that part of said petition which shows that the said plaintiff and his attorneys fraudulently and improperly joined George Wettengel with the said National
18 Enameling and Stamping Company, for the purpose of preventing the removal of this cause, and as to this averment affiant says that he believes the same to be true, and that he has investigated the matters connected with this accident.

MERITT *M.* HAYDEN.

Subscribed and sworn to before me this 3rd day of June, A. D. 1904.

My commission expires on the 21st day of October, A. D. 1907.

GEORGE T. WITZEL,
[SEAL.] Notary Public.

Know all men by these presents: That the National Enameling & Stamping Company, a corporation organized under the laws of New Jersey, as principal, and T. K. Niedringhaus of St. Louis, Mo., as surety, are held and firmly bound unto Conrad Wecker, of the City of St. Louis and State of Missouri, in the penal sum of Five Hundred Dollars ($500.00), for the payment whereof, well and truly to be made unto the said Conrad Wecker, his heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly, severally, firmly by these presents;

Yet upon these conditions: Whereas, the said National Enameling & Stamping Company, having petitioned the Circuit Court of the City of St. Louis, State of Missouri, for the removal of a certain cause therein pending, wherein Conrad Wecker is plaintiff, and The National Enameling & Stamping Company, Harry Schenk and George Wettengel, are defendants, to the Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri:

Now, if the said National Enameling & Stamping Company, said petitioner, shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in this suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold
19 that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

In witness whereof, the said National Enameling & Stamping Company, as principal, has caused these presents to be duly exe-

cuted, and its corporate seal hereto affixed this 31st day of May, A. D. 1904, and the said surety has caused these presents to be duly executed this 31, day of May, A. D. 1904.

NATIONAL ENAMELING & STAMPING CO.
T. F. CALESMAN, V. Pres. [SEAL.]
T. K. NIEDRINGHAUS, Surety.

Attest:
[SEAL.] A. M. STEINHARDT,
Ass't Secretary.

Approved in open court, this 6th day of June 1904.
WM. H. HAUSCHULTE, Clerk.

STATE OF MISSOURI, } ss:
City of St. Louis, }

T. K. Niedringhaus being first duly sworn on his oath says that he is a resident of the City of St. Louis and State of Missouri; that he has real estate in the said City of St. Louis of the value of more than $2000.00 over and above all exemptions and encumbrance of every kind and nature whatsoever and that said property for more than $2000.00 is subject to execution.

T. K. NIEDRINGHAUS.

Subscribed and sworn to before me this 4th day of June, 1904.
My term as Notary Public will expire the 14th day of Feb. 1908
[SEAL.] JESSE B. COZZENS,
Notary Public, City of St. Louis, State of Missouri.

20 STATE OF MISSOURI, } ss:
City of St. Louis, }

I, William H. Hauschulte, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, do hereby certify the above and foregoing, contains a true, full and complete transcript of the record and proceedings in the above entitled cause, including the petition, affidavit and bond for removal and the order of removal, as fully as the same remain of record and on file in my office (except the motion for security for costs which is hereto attached.)

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said Court, at office in the City of St. Louis, this the 8th day of September, 1904.

WM. H. HAUSCHULTE,
Clerk, Circuit Court.

And thereupon, to-wit: on said 19th day of September, A. D. 1904, there was also filed in said cause an Answer of Defendant National Enameling & Stamping Company, which said Answer is in words and figures as follows, to-wit:

(Answer.)

In the Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING COMPANY ET AL., Defendants.

Now comes the National Enameling & Stamping Company, one of the defendants in the above cause and for its separate an-
21 swer to the petition of plaintiff filed herein denies each and every allegation in said petition contained.

Further answering said defendant states that whatever injuries, if any, were sustained by the plaintiff on the occasion mentioned in his petition were caused by the negligence of plaintiff directly contributing thereto.

And for a further defense said defendant states that all the details of the surroundings amid which plaintiff was working on the occasion mentioned in his petition were open and obvious and were known to plaintiff, or by the exercise of ordinary care would have been known to plaintiff, and that whatever dangers, if any, existed in working amid said surroundings were open and obvious and were known to plaintiff, or by the exercise of ordinary care would have been known to plaintiff, and that plaintiff assumed whatever risk, if any, there was in working amid said surroundings on said occasion.

Wherefore having fully answered said defendant prays to be hence dismissed with its costs.

WISE McNULTY &
SEDDON & HOLLAND,
Attorneys for said Defendant.

And thereupon, to-wit: on said 19th day of September, A. D. 1904, there was filed also in said cause a Demurrer of Defendant George Wettengel, which said Demurrer is in words and figures as follows, to-wit:

(Demurrer of Def't George Wettengel.)

In the Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING CO. ET AL., Defendants.

Now comes George Wettengel, one of the defendants in the
22 above cause and demurs to the petition of plaintiff filed herein, and for ground of his demurrer assigns that said petition does not state a cause of action against this defendant.

WISE McNULTY &
SEDDON & HOLLAND,
Attorneys for Defendant, Geo. Wettengel.

And afterwards, to-wit: on the 15th day of October, A. D. 1904, there was filed in said cause a Motion to Remand, which said Motion to Remand is in words and figures as follows, to-wit:

(Motion to Remand.)

In the Circuit Court of the U. S. for the Eastern Division of the Eastern Judicial District of Missouri, September Term, 1904.

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING & STAMPING CO., a Corporation; Harry Schenk and George Wettengel, Defendants. } No. —.

Plaintiff's Motion to Remand the Above Entitled Cause to the Circuit Court for the City of St. Louis, State of Missouri.

Now comes the plaintiff in the above entitled cause and moves that the court remand same to the Circuit Court for the City of St. Louis, State of Missouri, because

1. There is not in said cause a controversy wholly between citizens of different States and which can wholly be determined between them.

2. There is not in said cause a separate controversy which is wholly between the said plaintiff and the said defendant, The National Enameling & Stamping Co., and which may be wholly determined between them without the said co-defendants being parties thereto.

23 3. The said defendant, George Wettengel, was not improperly and fraudulently joined as defendant herein for the purpose of fraudulently and improperly preventing, or attempting to prevent, the removal of this cause to this court.

R. T. BROWNRIGG &
W. L. MASON,
Attorneys for Plaintiff.

And afterwards, to-wit: on the 9th day of November, A. D. 1904, the following further proceedings were had and appear of record in said cause as follows, to-wit:

(Motion to Remand Submitted.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING CO. ET AL., Defendants. } 5068.

The motion to remand heretofore filed herein is this day argued by counsel and submitted to the Court—3 affidavits filed.

And afterwards, to-wit: on the 3rd day of December, A. D. 1904, the following further proceedings were had and appear of record in said cause as follows, to-wit:

(Motion to Remand Denied.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING CO. ET AL., Defendants. } 5068.

The Court having fully considered the motion to remand heretofore submitted herein doth order that the said motion be denied.

And afterwards, to-wit: on the 22nd day of December, A. D. 1904, there was filed in said cause a Bill of Exceptions to Court's Ruling on Motion to Remand, which said Term Bill of Exceptions
24 is in words and figures as follows, to-wit:—

(Bill of Exceptions.)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

In the Circuit Court of the United States in and for the said Division of said District, September Term, 1904.

CONRAD WECKER, Plaintiff,
vs.
THE NATIONAL ENAMELING AND STAMPING CO., a Corporation; George Wettengel *et al.*, Defendants. } No. —.

Be it remembered that on the 15" day of Oct., 1904, and during the September term of said court, the plaintiff in the above entitled cause filed a motion to remand the cause to the Circuit Court of the City of St. Louis, State of Missouri, which said motion is in words and figures as follows, to-wit:

In the Circuit Court of the U. S. for the Eastern Division of the Eastern Judicial District of Missouri, September Term, 1904.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING Co., a Corporation; Harry Schenk and George Wettengel, Defendants. } No. 5068.

Plaintiff's Motion to Remand the Above Entitled Cause to the Circuit Court for the City of St. Louis, State of Missouri.

Now comes the plaintiff in the above entitled cause and moves that the court remand same to the Circuit Court for the
25 City of St. Louis, State of Missouri, because

1. There is not in said cause a controversy wholly between citizens of different states and which can wholly be determined between them.

2. There is not in said cause a separate controversy which is wholly between the said plaintiff and the said defendant, the

National Enameling & Stamping Co., and which may be wholly determined between them without the said co-defendants being parties thereto.

3. The said defendant, George Wettengel, was not improperly and fraudulently joined as defendants herein for the purpose of fraudulently and improperly preventing, or attempting to prevent, the removal of this cause to this court:

R. T. BROWNRIGG &
W. L. MASON,
Attorneys for Plaintiff.

In support of and resistance to said motion the following affidavits were filed:

(Affidavit of Conrad Wecker.)

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

STATE OF MISSOURI, } ss:
City of St. Louis, }

CONRAD WECKER, Plaintiff,
vs.
THE NATIONAL ENAMELING & STAMPING CO., Defendant. } No. 5068.

Conrad Wecker, being duly sworn on his oath, says: That he was in the employment of the defendant, The National Enameling & Stamping Co., prior and up to the time of the construction of
26 the furnace structure mentioned in plaintiff's petition filed herein; and that George Eisenmayer was, prior and up to the time of the construction of said structure, in the employment of said defendant company, and was charged with the general supervision of the work and business of the said company at the place at which plaintiff was employed and at which he received his injuries, as set forth in his petition filed herein. That just prior to the construction of the said furnace structure the plaintiff heard the said Eisenmayer direct the said defendant George Wettengel to prepare plans for a furnace structure to be erected upon the spot whereupon was shortly afterwards erected the furnace structure upon which plaintiff was at work when he received the injuries set forth in his petition; that plaintiff at the time he filed his petition herein believed, and still believes, that the said defendant George Wettengel planned and directed the construction of the said furnace structure as set forth in plaintiff's petition filed herein.

CONRAD WECKER.

Sworn to and subscribed before me this 9th day of November, 1904.

My term expires on the 14th day of January, 1908.

[SEAL.] CLAUD D. HALL,
Notary Public, City of St. Louis, State of Mo.

(Affidavit of George Eisemayer.)

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING CO., Defendant.

27 George Eisemayer being first duly sworn on his oath says that on the 12th day of November, 1902, and for some years previous thereto, he was in the employ of the National Enameling and Stamping Co., in the capacity of Chief Engineer, that as such chief engineer affiant was charged, among other things, with the duty of seeing to the repairs of the apparatus used by the defendant and also planning any new apparatus that was about to be adopted. Affiant further states that during said period it was customary for the National Enameling and Stamping Co. to do all or most of its own work, in connection with repairs and construction, and affiant states that in order to get proper execution of such work of repairs and construction George Wettengel was employed in the office of defendant as a draftsman, and that several other persons were employed in the said office as draftsmen. And affiant further states that the sole work of said George Wettengel, during the period above mentioned, was that of draftsman and that said George Wettengel had nothing to do with selecting plans or approving plans, but that his sole work was to take plans and ideas given to him, and to make the necessary drawings for the use of the mechanics.

And affiant further states that said George Wettengel, during said period, had no authority to employ or discharge men, or no authority whatever to superintend the work of any of the men, nor authority to give instructions to any of the men as to how they should do their work, and further affiant saith not.

GEO. F. EISENMAYER.

Sworn and subscribed to before me this 26th day of October, 1904.

My term expires on the 14 Day of February, 1908.

[SEAL.] JESSE B. COZZENS,
Notary Public, City of St. Louis, State of Missouri.

(Affidavit of George Wettengel.)

28 STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff, }
vs.
NATIONAL ENAMELING & STAMPING COMPANY, Defendant. }

George Wettengel being first duly sworn on his oath says that he is 28 years of age, and is one of the defendants in the above suit. Affiant states that at the time mentioned in plaintiff's petition, to-wit, the 12th day of November, 1902, and for about ten years previous thereto, affiant had been employed by the National Enameling and Stamping Company as a draftsman; that at the time of said accident, and for some years previous thereto, the affiant had no other duties in the said employment, except to act as a draftsman; that all his work was done in the office of said company, and that he had no work whatever outside of the office, and was not thrown in contact with the employes outside of the office, or with the plaintiff, and was charged with no duty whatever of superintendence in connection with the work of the outside employes, or with the plaintiff, at the time of said accident, or for several years previous thereto.

Affiant further states that he was not charged, at the time of said accident, or for several years previous thereto, with any duty of designing or planning the apparatus that was used in the defendant's plant, but that the designing of all apparatus, and the selection of apparatus was made by other persons, and that the sole duty of affiant, at the time of said accident, and for several years previous thereto, was to attend to the mechanical work of drafting
29 which was based exclusively upon the ideas and plans adopted by other persons. And affiant further states that he had no discretion whatever as to what sort of apparatus should be used in any part of defendant's plant; and with reference to the particular pots mentioned in plaintiff's petition, and into one of which plaintiff claims he fell, affiant states that he had nothing to do with planning said pots, and had no right whatever to determine what sort of pots should be used, or whether a railing should be used, in connection with the same, or what sort of hoisting apparatus should be used.

And affiant further states that he is charged with no duty by defendant, in connection with the plaintiff as to how and when he should do his work, but that affiant had no authority whatever to give any instructions. In short, affiant states that his position was a clerical position in the office, and his duties were confined to the actual making of drawings to enable mechanics to do construction work upon the basis of plans adopted by other persons tha affiant

in the employ of defendant. And affiant further states that there is no ground whatever for the suit of Conrad Wecker against affiant, and that in truth and in fact there is no possible ground upon which any charge can be made against this affiant in connection with the accident set out in plaintiff's petition, which occurred on November, 12, 1902.

Affiant further states that at the time of the said accident, and for several years previous thereto, he did not know the plaintiff, Conrad Wecker, by name, and did not know what sort of work he was doing, or in what part of the defendant's plant he was engaged. And affiant further states that he was never thrown in contact with the said Conrad Wecker in his work and was charged with no duty whatever of superintending the work of said Conrad Wecker or instructing the said Conrad Wecker how to do his work, and further affiant saith not.

GEO. WETTENGEL.

Sworn and subscribed to before me this 22nd day of October, 1904. My term expires Aug. 4th, 1908.

[SEAL.] JOHN M. DOERMA,
Notary Public, City of St. Louis,
State of Missouri.

(Bill of Exceptions—Continued.)

That thereafter, on the 4th day of December and on one of the days of the September term, 1904, of said court, the said motion, having been heard by said court, and after due consideration thereof by the court, was, on said 4th day of December, 1904, during said September term of said court, overruled by said court in an order in words and figures as follows, to-wit:

It is ordered that the motion to remand is denied.

That thereupon, said plaintiff then and there excepted to the action of the court denying said motion.

That the said exceptions to the action of the court in denying said motion may be saved and made part of the record, plaintiff hereby tenders his bill of exceptions and prays that the same may be signed, sealed and filed in this cause, which is accordingly done this 22nd day of December, and during said September term of said court.

ELMER B. ADAMS,
Judge of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

O. K.
SEDDON & HOLLAND.

And afterwards, to-wit: on the 26th day of January, A. D. 1905, there were had in said cause the following proceedings and same appear of record as follows, to-wit:

(Demurrer Submitted.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING COMPANY ET AL., Defendants. } 5068.

The demurrer to the petition heretofore filed herein is this day submitted to the Court.

And afterwards, to-wit: on the 15th day of February, A. D. 1905, the following further proceedings were had and appear of record in said cause as follows, to-wit:

(Demurrer Sustained.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING & STAMPING CO. ET AL., Defendants. } 5068.

The Court having fully considered the demurrer to the petition by defendant George Wettengel doth order that said demurrer be sustained.

And afterwards, to-wit: on the 13th day of April, A. D. 1905, the following further proceedings were had and appear of record as follows, to-wit:

(Dismissal and Judgment.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING & STAMPING COMPANY, a Corporation; Harry Schenk, and George Wettengel, Defendants. } 5068.

Now on this, the 13" day of April, 1905, come the parties by their attorneys, and thereupon the said plaintiff, by his at-
32 torney, states to the Court that he elects to stand upon his motion to remand the said cause to the Circuit Court for the City of St. Louis, State of Missouri, which motion has been heretofore overruled by the Court, and that the said plaintiff refuses to recognize the jurisdiction of the Court, or to proceed with the prosecution of the said cause in this Court; thereupon on motion of defendant it is ordered that said cause be dismissed.

It is therefore considered by the court that the plaintiff Conrad Wecker take nothing by his suit in this behalf, and that the defendants National Enameling & Stamping Company, a Corporation, Harry Schenk, and George Wettengel, go hence without day and recover of the said plaintiff their costs and charges herein expended and have execution therefor.

And afterwards, to-wit: on the 17th day of April, A. D. 1905, there was filed in said cause a Motion in Arrest which said Motion is in words and figures as follows, to-wit:—

(Motion in Arrest.)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judici } ss:
District of Missouri,

In the Circuit Court of the United States in and for said Division of said District, September Term, 1904.

CONRAD WECKER, Plaintiff,
v.
THE NATIONAL ENAMELING AND STAMPING COMPANY, a Corporation; George Wettengel *et al.*, Defendants. } No. 5068.

Comes now the plaintiff in the above entitled cause and moves the court to arrest the judgment rendered herein upon the grounds and for the reasons following:

33 1st. Because the court erred in overruling plaintiff's motion to remand the said cause to the Circuit Court of the City of St. Louis, State of Missouri;

2nd. Because upon the entire record the judgment is erroneous.

BROWNRIGG & MASON,
Att'ys for Plaintiff.

Received Copy April 17th 1905.

SEDDON & HOLLAND.
J. H. A.

And afterwards, to-wit: on the 18th day of April, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:

(Motion in Arrest Overruled.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING COMPANY ET AL., Defendants. } 5068.

The Court having fully considered the motion in arrest of judgment this day submitted herein, doth order that the said motion be overruled.

And afterwards, to-wit: on the 26th day of April, A. D. 1905, there was filed in said cause a Certificate of the Judge, which said Certificate is in words and figures as follows, to-wit:

(Certificate of the Judge.)

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING COMPANY and GEORGE WETTENGEL, Defendants.

34 I, Elmer B. Adams, Judge of said court hereby certify that the only question decided by the court in this cause is that the joining of defendant Wettengel as co-defendant with defendant National Enameling & Stamping Company, was palpably groundless and fictitious, and done for the purpose of unlawfully depriving the defendant Stamping Company of its right to remove the cause to this court for trial. For this reason the motion to remand the cause to the State Court was denied. In deciding this motion the the court took into consideration, not only the complaint and petition for removal, but the affidavits filed in support and opposition to the motion to remand. The plaintiff refused to submit to the jurisdiction of this court and suffered a dismissal of the suit for want of prosecution. The question is whether this court had jurisdiction of the action.

Witness my hand this 26th day of April A. D. 1905.

ELMER B. ADAMS, Judge.

And afterwards, to-wit: on the 15th day of September, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:

(Appeal granted.)

CONRAD WECKER, Plaintiff,
v.
THE NATIONAL ENAMELING AND STAMPING COMPANY ET AL., Defendants. } 5068.

Now comes plaintiff by attorney and files an assignment of errors and a petition for a writ of error to the United States Supreme Court from the judgment rendered herein; thereupon it is ordered that said writ of error be granted and that plaintiff give a cost bond in the sum of Five hundred dollars ($500.00); thereupon said plaintiff presents a bond in the sum of five hundred dollars
35 ($500.00); thereupon said plaintiff presents a bond in the sum of five hundred dollars which is approved by the Court and filed, and a citation, citing and admonishing said defendants to be and appear at the said United States Supreme Court within thirty days from this date is signed by the Judge.

Which said Assignments of Errors, Petition for Writ of Error and Bond are in words and figures as follows, to-wit:

(Assignment of Errors.)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

In the Circuit Court of the United States in and for said Division of said District, September Term, 1904.

CONRAD WECKER, Plaintiff,
vs.
THE NATIONAL ENAMELING AND STAMPING COMPANY, a Corporation, George Wettengel *et al.*, Defendants. } No. 5068.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers exist.

First. The court erred in denying the plaintiff's motion to remand the cause to the Circuit Court for the City of St. Louis, State of Missouri.

Second. The court erred in holding that plaintiff in his petition does not state a joint cause of action against the said defendants, The National Enameling and Stamping Company and George Wettengel.

36 Third. The court erred in holding that plaintiff's complaint herein discloses but one cause of action and that against the defendant corporation.

Fourth. The court erred in conceiving that there is in said suit any controversy wholly between citizens of different States and which could wholly be determined between them.

Fifth. The court erred in sustaining the demurrer of the defendant, George Wettengel.

Sixth. The court erred in dismissing plaintiff's petition and entering judgment in favor of defendants.

Wherefore, plaintiff prays that said judgment may be reversed.

BROWNRIGG & MASON,
Attorneys for Plaintiff.

(Petition for Writ of Error.)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

In the Circuit Court of the United States in and for said Division of said District. September Term, 1904.

CONRAD WECKER, Plaintiff,
vs.
THE NATIONAL ENAMELING AND STAMPING COMPANY, a Corporation, George Wettengel *et al.*, Defendants. } No. 5068.

Now comes Conrad Wecker, plaintiff herein, and says: That on the 13th day of April, 1905, the Circuit Court for the Eastern Divi-

sion of the Eastern Judicial District of Missouri entered judg-
37 ment herein in favor of the defendant and against this plaintiff, in which and in the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for correction of the errors so complained of, and that a transcript of the record proceedings and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States.

BROWNRIGG & MASON,
Attorneys for Plaintiff.

(Bond.)

Know all men by these presents, That we, Conrad Wecker as principal and Arnold Kulage as surety are held and firmly bound unto The National Enamelling & Stamping Co., and George Wettengel in the full and just sum of five hundred dollars to be paid to the said National Enameling & Stamping Co., and George Wettengel their heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this fifteenth day of September in the year of our Lord one thousand nine hundred and five.

Whereas, lately at the March term A. D. 1905, of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in said Court between Conrad Wecker plaintiff and The National Enameling & Stamping Co., & George Wettengel defendants judgment was rendered
38 against Conrad Wecker and the said Conrad Wecker has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said National Enammeling & Stamping Co. and George Wettengel citing and admonishing them to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the date of said Citation.

Now the condition of the above obligation is such, That if the said Conrad Wecker shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

CONRAD WECKER. [SEAL.]
ARNOLD KULAGE. [SEAL.]

Sealed and delivered in presence of—
FRED S. HALL.
M. T. DONOVAN.

Approved by—
G. A. FINKELNBURG, Judge.

(Opinion on Motion to Remand.)

39 In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING CO., HARRY SCHENK and George Wettengel, Defendants. } No. 5068.

ADAMS, District Judge:

This action was instituted by the plaintiff in one of the Circuit Courts of the State. He charged in his complaint that he was employed by the defendant corporation to work about certain large metal pots used for the melting of grease and lubricant matter; that the corporation failed to use proper care to furnish a reasonably safe place for him to work, or reasonably safe appliances with which he should work. The negligence is particularized as follows: That the corporation failed to provide the metallic pots with any covering, railing or other device to protect its servants from liability to fall into them. It is observed from this general statement, that the negligence charged against the corporation is a failure to perform that positive duty which the law imposes upon a master to provide a reasonably safe place and reasonably safe appliances for use of its servants.

After setting forth the facts already referred to the plaintiff avers: that the individual defendant Wettengel was employed by the corporation and charged with the duty of planning and constructing the bank of metallic pots, and with the duty of seeing that they were safely covered, railed off or otherwise protected, so that
40 the employés might not be unreasonably exposed to danger; that as a result of what complainant denominates the joint negligence of both the corporation and Wettengel, he was precipitated into one of these metallic pots and injured.

In due course the defendant corporation filed its motion to remove the cause from the State Court to this court, alleging in its petition that the plaintiff was a citizen of the State of Missouri; that the defendant corporation was a citizen of the State of New Jersey, and that defendant Wettengel was a citizen of the State of Missouri, and alleging further that the defendant Wettengel was fraudulently joined as a defendant for the purpose of improperly preventing the removal of the cause to this court, and that there is a separable controversy within the meaning of the Judiciary Act of 1887, as amended by the Act of 1888, wholly between the plaintiff and the defendant corporation, which can be fully determined as between them, and with respect to which the defendant Wettengel has no concern.

Upon the filing of such a petition in the State Court the cause was ordered removed to this court. The plaintiff now comes and

moves to remand the cause to the State Court on the grounds as alleged; (1) That Wettengel was not fraudulently joined as a defendant for the purpose of preventing removal, and (2) That no separable controversy between the plaintiff and the defendant corporation is disclosed by the complainant.

Plaintiff contends that the defendant corporation and the defendant Wettengel are properly joined, because they are charged to be joint tort feasors, and because both are liable to the plaintiff for the injury which he has sustained. The defendant contends that there is no liability stated as against defendant Wettengel, that the only liability stated in the pleading is against the corporation, and
41 that as a result thereof the case was properly removed.

I have, as is well known by the bar, frequently ruled: that where a complaint charges in appropriate language that a corporation and an individual are jointly guilty of an act of negligence, and where the complaint itself does not disclose a want of joint liability, the right of removal exists and cannot be defeated by any showing *aliunde* the complaint itself, that the two were not jointly liable. Such rulings have always been predecated upon the averments of the complaint as they there appear. But where a complaint discloses the fact there can be no joint liability, and that an allegation of that sort is groundless and fictitious, then such an allegation cannot deprive the non-resident defendant of his right to remove the cause. Referring again to the averments of the complaint, it appears that the charge is: that the defendant corporation failed to perform its duty in the matter of providing a reasonably safe place for the plaintiff to work, and that the defendant Wettengel was the agent of the corporation in the matter of making this provision. In other words the defendant Wettengel is charged in the complaint to have been acting within the scope of his duty as agent in the performance of one of the fundamental and positive duties of the master. He is charged with negligence merely—is not charged with wantonness, recklessness or other active misconduct. Does such a complaint disclose any cause of action at all against the agent? I think not. The only charge against him in legal effect is; that he failed to use reasonable care in doing the work of his principal. Such failure is a proper definition of negligence. Negligence is negative in character. It is the omission to perform some duty.
42 Milwaukee R. R. Co. vs. Ames, 91 U. S. 489. It implies non-feasance as distinguished from mis-feasance. It certainly does not imply wantonness or recklessness or express malice. For acts of mere negligence without wantonness or express malice, the servant incurs no liability to a third person, the master alone is liable. Story on Agency, 9th Ed. 308, 309; Kelly vs. C. & A. Railway Co., 122 Fed. 286; Davenport vs. Southern Railway Co., 124 Fed. 983, Shaffer v. Union Brick Co. 128 Fed. 97, Hilms vs. N. P. Ry. Co. 120 Fed. 389, and cases therein cited.

The complaint itself shows too much for the plaintiff's purposes. It clearly states him out of court as to defendant Wettengel. In the light of the averments of the complaint just referred to, the general broad statement of the legal conclusion that plaintiff was injured

by the joint negligence of both the corporation and Wettengel, can have no effect.

The views already expressed are in harmony with the opinion of the Supreme Court of the United States in Chesapeake & Ohio Railway Company vs. Dixon, 179 U. S. 131. Certain expressions are there employed which give color to the contention of the plaintiff in this case. The court held in that case that the right of removal did not exist. In other words it held that the charge of concurrent negligence on the part of the railroad company and the engineer, might, so far as the petition disclosed, exist. The court there says: "The negligence may have consisted in that the train was run at too great speed; and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurring negligence may be imagined. And where concurring negligence is charged the controversy is *is* not separable."

43 It seems obvious from the foregoing language that if the plaintiff in the Dixon case had charged that the only act of negligence was the running of the train at an excessive rate of speed, and that the company acted in the matter of operating the train solely by and through its agent the engineer, a different result would have been reached. As I understand that case, the conclusion reached, was based upon the facts appearing in the complaint, that a joint act of negligence was charged and no showing was otherwise made in the complaint negativing the joint and concurrent act of negligence.

I am therefore disposed to apply the doctrine of the case of Bank of Arapahoe vs. Bradley, 72 Fed. 867, 872, and to hold that the joining of the individual defendant with the corporation in this case, is probably groundless and fictitious, and obviously intended to unlawfully deprive the defendant of the right given him to remove its cause into this court for trial. There is disclosed in the complaint but one cause of action and that is against the corporation.

The motion to remand is denied.

(Opinion on Motion in Arrest.)

ADAMS, *J.*:

The opinion rendered heretofore on the motion to remand made no allusion to the affidavits filed, tending to show the fictitious and fraudulent joining of defendant Wettengel, and it is sufficient now to say that they inevitably show that the inferences drawn from the allegations of the petition are correct.

44 These affidavits may be considered on the question involved in the motion. Enstofson v. Chicago R. I. & P. Ry. Co. 128 Fed. 85.

45 UNITED STATES OF AMERICA, Eastern Division of the Eastern Judicial District of Missouri, } ss:

I, James R. Gray, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the writing hereto attached is a full, true and complete transcript of the record and proceedings in said Case No. 5068 of Conrad Wecker Plaintiff, vs. National Enameling and Stamping Company (a corporation), Harry Schenk and George Wettengel defendants together with all things concerning the same as fully as the same remain on file and of record in said case in my office, and that the original citation and writ of error are herewith attached and returned.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court, at office, in the City of St. Louis, in the Eastern Division of said District, this 16″ day of September in the year of our Lord, nineteen hundred and five.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

JAMES R. GRAY,
Clerk of Said Court,
By —— ——, Deputy.

[Endorsed:] No. 5068 United States Circuit Court Eastern Division of the Eastern Judicial District of Missouri. Conrad Wecker Plaintiff against National Enameling and Stamping Co., Harry Schenk and George Wettengel Transcript to the Supreme Court of the United States.

Endorsed on cover: File No. 19,932. E. Missouri C. C. U. S. Term No. 430. Conrad Wecker, Plaintiff in Error, vs. The National Enameling and Stamping Company and George Wettengel. Filed October 11th, 1905. File No. 19,932.